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IN THE

Supreme Court of the United States

KISKA CONSTRUCTION CORPORATION—U.S.A. and
KAJIMA ENGINEERNG AND CONSTRUCTION, INC.,
PARTNERS IN KISKA-KAJIMA, A JOINT VENTURE,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITIONER

Petitioner has consented to the filing of this brief by letter dated July 29, 2003. Respondent, however, has refused to grant consent. Pursuant to Supreme Court Rule 37.2(b), therefore, *amicus curiae* The General Contractors Association of New York, Inc. ("GCA") respectfully moves for leave to file this brief in support of petitioner in the above-captioned case.

GCA is a construction industry not-for-profit corporation that for 94 years has promoted procurement policies, regulations and legislation that foster free and fair competitive bidding practices for public construction projects, which serve the public interest, protect the public fisc and prevent

corruption. Toward that end it has regularly dealt with legislative, administrative and executive representatives at the local, state and federal levels to support legislation, regulations and case law that encourage full disclosure in the bidding process. GCA and its members have a direct and immediate interest in cases such as this that threaten to impede fair bidding procedures for public construction projects.

GCA believes that the broad, industry perspective presented in its accompanying brief as *amicus curiae* will be of distinct assistance to the Court in its consideration of the petition for a writ of certiorari.

Accordingly, *amicus* requests leave to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

I

Have lower courts, and in particular the D.C. Circuit here, overstepped their authority and committed error, by unilaterally and belatedly reinterpreting the plain English of the WMATA Compact so as to convert its governmental/ proprietary dichotomy into a discretionary/ministerial divide for convenience of application?

II

Assuming that a discretionary/ministerial standard is applicable under the WMATA Compact, is there a public policy that sanctions discretion to commit a fraud?

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BRIEF OF *AMICUS CURIAE* THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The General Contractors Association of New York, Inc. ("GCA") is a not-for-profit organization founded in 1909.[1]

[1] Pursuant to Supreme Court Rule 37.6 *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* or its members made a monetary contribution to the preparation or submission of this brief. Although petitioner has consented to the filing of this brief, respondent has not, and the amicus has therefore included a motion for leave to file pursuant to Supreme Court Rule 37.2(b).

Its membership is composed of contractors engaged in heavy construction, such as the building of bridges, tunnels, highways, transit facilities, sewage treatment plans and other large public construction projects. GCA's members collectively undertake many billions of dollars worth of heavy construction work each year.

GCA's members secure their work principally through competitive public bidding and have a vital interest in knowing that the plans, specifications, borings and other documents made available to them by public owners prior to a bid letting are as complete and accurate as possible and that any superior knowledge available to the public owner is not withheld. Although sealed competitive bidding involves substantial risk, which GCA's members and other contractors are aware of and assume, it is not intended to be gambling. The strict adherence by the Washington Metropolitan Transit Authority ("WMATA") to a standard of full and fair disclosure is infinitely more in the public interest than obtaining a pecuniary benefit in an individual case by engaging in a practice that does violence to the spirit and purpose of competitive bidding.

GCA and its members believe the issues in this case to be significant to the construction industry and, accordingly, submit this brief in support of the petition for a writ of certiorari.

INTRODUCTION

While *amicus* joins in the arguments presented by petitioner, it seeks by this brief to supplement those arguments by bringing to the court's attention the construction industry's broad perspective and its concern over the adverse consequences that are likely to result from the D.C. Circuit's improper holding.

This case has now fully affirmed as the law that WMATA is immune on jurisdictional sovereign immunity grounds

from any claim for damages arising out of its tortious misrepresentation in the inducement of a contract. Unlike the Federal Tort Claims Act ("FTCA"), which in Title 28 § 2680(h) contains a misrepresentation exception to the general waiver of sovereign immunity, the WMATA Compact contains no such exception. Yet, the D.C. Circuit, while nominally accepting the complaint's allegations of misrepresentation as true, as it had to, nonetheless enveloped its dismissal in the cocoon of "discretion" and neglected to deal directly with the central issue of whether there exists a public policy to shield WMATA's fraud.

The expansion of the discretionary exception in FTCA cases, which has occurred mostly in personal injury and wrongful death claims resulting from allegations of negligence, should not be extended to WMATA, either by unwarranted revision of the Compact's language or by countenancing tortious misrepresentation through reasoning that uses the FTCA as an analogue.

Absent review and reversal by the Supreme Court, the holding in this case will compel contractors to inflate their bids to WMATA, at the public's expense, by including a contingency amount designed to protect against the possibility that significant information is being misrepresented or withheld from them. Analogously, the cases have long recognized that changed conditions clauses are added to government contracts to take the gambling aspect out of public bidding and to prevent both windfalls and disasters. See *e.g.*, *Foster Construction C.A. and Williams Brothers Company v. United States*, 435 F.2d 873, 887, 193 Ct. Cl. 587 (1970) and *Kaiser Industries Corp. v. United States*, 340 F.2d 322, 329, 169 Ct. Cl. 310, 323 (1965).

ARGUMENT

I. THE COURTS ARE WITHOUT AUTHORITY TO CHANGE THE SOVEREIGN IMMUNITY STANDARD IN THE WMATA COMPACT

In 1966, 20 years after the enactment of the discretionary function exception in the FTCA; 13 years after this court's first explication of that exception in *Dalehite v. United States*, 346 U.S. 15 (1953); and 11 years after this court took note in *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) of the "nongovernmental"—"governmental" quagmire that long plagued the law of municipal corporations, Congress adopted the WMATA Compact for the District of Columbia, Maryland and Virginia and in Section 80 thereof waived sovereign immunity based on acts "committed in the conduct of any proprietary function."[2]

In the cases that followed the adoption of the Compact, the courts concerned themselves with deciding whether the acts that gave rise to the causes of action occurred in the performance of a proprietary or a governmental function. See *e.g.*, *Martin v. WMATA*, 667 F.2d 435 (4th Cir. 1981) and *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986). In *Morris*, Judge Bork commented in footnote 5 that the terms of a compact enacted after the establishment of the instrumentality/political subdivision test would be highly probative evidence of intent to confer immunity or not because those words had become terms of art. By like reasoning, the adoption of the WMATA compact 20 years after the enactment of the FTCA yet waiving immunity from tort claims arising out of a "proprietary function" is highly probative of Congress' intent.[3]

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[2] The WMATA Compact is codified in D.C. Code § 9-1107.01, Maryland Code, Trans. § 10-204(80), Virginia Code § 56-529, 530.

[3] By an *en banc* decision in *Spencer v. General Hospital*, 425 F.2d 479, 484 (D.C. Cir. 1969), the court declared "a formal interment of the

History amply demonstrates that building and running railroads has always been a proprietary function through which great personal fortunes were made. The fact that a government entity undertakes to create and operate a railroad does not change the nature of the activity, nor make it a core governmental function akin to police, sanitation and military services. One case has held that the design and planning of a transportation system falls into the governmental category (*McKethean v. WMATA*, 588 A.2d 708 [D.C. Cir. 1991]), while a second has held that the provision of mass transportation under the Compact is a proprietary function (*QASIM v. WMATA*, 455 A.2d 904 [D.C. Cir. 1983], *cert. denied* 461 U.S. 929 [1983]). A third invoked the distinction that the design of the metrorail system was governmental and its operation proprietary. *Beatty v. WMATA*, 860 F.2d 1117 (D.C. Cir. 1988). But, common sense compels the conclusion that there is no difference between the two classifications, and that the creature is either fish or fowl, not a little of each. Even in the context of FTCA litigation, where the discretionary function exception concededly applies, the Supreme Court held in *United States v. Gaubert*, 499 U.S. 315 (1991) that the Court of Appeals had improperly perpetuated a nonexistent dichotomy between discretionary function and operational activity.

The difficulty of discerning when an activity is governmental or proprietary does not authorize the courts to change the plain language written into the Compact by Congress. Yet, that is precisely what the D.C. Circuit did for the first time in *Sanders v. WMATA*, 819 F.2d 1151 (D.C. Cir. 1987), 21 years after the adoption of the Compact. Moreover, it did so despite its recognition that the legislative history of the

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`governmental-proprietary' test of immunity" and stated that "we flout no visible purpose or policy of Congress but, rather, only bury one of our own offspring ___." Here, on the contrary, Congress has expressly enunciated its policy.

Compact sheds no light on the meaning or scope of the proprietary function; and that the FTCA's standard and the Compact's standard are distinct and not necessarily coterminous, citing the *Restatement (Second of Torts)* § 895 C comments e and g and *Prosser and Keaton on Torts* 1953 (5th ed. 1983). *Sanders* was a case involving employees who were discharged in connection with WMATA's general policy of testing for drugs or alcohol immediately after an on-the-job accident or incident and might well have fallen into the area of governmental function based on public safety. Whether that is so or not, the case itself surely should not have been the springboard to propel so radical a change of prior decisions interpreting the Compact during the course of the preceding two decades.

The Fourth Circuit, over a vehement dissent, recently joined the D.C. Circuit's conclusion in *Sanders* that the discretionary function exception of the FTCA should be read into the WMATA Compact. *Smith v. WMATA*, 290 F.3d 201, *cert. denied* 123 S.Ct. 387, Ct. 387 (4th Cir. 2002). In *Sanders*, the court wrote, in unsure language, "[T]he Compact *seems to us* to have accepted the *Dalehite* conception we have just outlined" (emphasis supplied). 819 F.2d at 1155. The *Smith* court, however, changed that to an unqualified statement that "The Compact `accepted the *Dalehite* conception'. . ." 290 F.3d at 207. More significant, however, is that the rationale that the Compact came into existence 13 years after *Dalehite* and therefore should be said to have adopted *Dalehite* fails to withstand scrutiny. To begin with that analysis turns the matter on its head for the reasons set out at the start of this point. Second, as Judge Michael pointed out in his dissent in *Smith*, the fact that the WMATA Compact implicates federal law does not mean that the governmental function in the Compact should track the discretionary function in the FTCA. 290 F.3d at 220.

The wholesale incorporation into the WMATA Compact of the FTCA's discretionary function exception is no more legitimate than would be the incorporation of the FTCA's misrepresentation exception. Congress didn't put them into the Compact and, consequently, they don't belong.

II. EVEN ASSUMING THE APPLICABILITY OF A DISCRETIONARY/MINISTERIAL STANDARD UNDER THE WMATA COMPACT, THERE CAN BE NO PUBLIC POLICY SANCTIONING DISCRETION TO COMMIT A FRAUD

The complaint in this action alleges that WMATA knowingly, intentionally, purposefully, deliberately and negligently made false representations and concealments of material information (which it identifies with particularity) to induce petitioners to submit a low bid for the Green Line 14th Street Tunnels; that petitioners without knowledge of the falsity relied on those representations; and that as a result thereof they suffered damages in the performance of the contract in the sum of at least $44,000,000 over and above the original contract price of $42,905,000. App. 32a-33a, 63a-68a.

Those allegations of fraud, misrepresentation and concealment must be accepted as true on a motion to dismiss, and petitioners are not required to prove them at this time. *Berkovitz v. United States*, 486 U.S, 531 (1988).[4] The D.C. Circuit here made a passing reference to acceptance of the dismissed factual allegations of the complaint as true

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[4] *Berkovitz* also demonstrates the difference in standards between the Compact and the FTCA. *Berkovitz* put to rest the government's argument that there are "uniquely governmental functions" that preclude liability against the government under the FTCA. However, quintessential governmental activity is still very much a standard for invoking immunity from tort under the WMATA Compact. See *e.g.*, *Dant v. District of Columbia*, 829 F.2d 69 (D.C. Cir. 1987); *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997); opinion below, FN8 App. 10a.

(App. 7a), and then proceeded to draw its own contrary conclusions. For example, there is certainly nothing in the record to support the court's assumption that WMATA was exercising discretion in not releasing "unreliable or mistaken reports." App. 15a. The D.C. Circuit conceded that "WMATA may not withhold all unfavorable information from contractors", but neglected to elucidate by example or to explain why not, except to say that few contractors would then be willing to submit bids to WMATA. App. 15a.

There appears to be no case prior to this one in which fraud in the inducement of a contract by WMATA has been subjected to sovereign immunity scrutiny. In response to petitioners' contention that the FTCA contains a "misrepresentation" exception and the WMATA Compact does not, the D.C. Circuit merely stated, without analysis, that it had previously upheld the dismissal of fraud and misrepresentation claims against WMATA, citing *Beebe v. WMATA*, 129 F.3d at 1286, 1288. App. 11a-12a, FN 11. An examination of *Beebe* shows that there is little or nothing in it to support the broad meaning imputed to it by the D.C. Circuit in this case. Beebe was a disappointed WMATA employee who, failing to get the higher job he wanted, sued WMATA and two of his co-employees and filed a scattershot complaint alleging ten causes of action, including tort claims for fraud, intentional infliction of emotional harm, gross negligence, defamation and wrongful interference with his employment relationship. Applying federal common law, the *Beebe* court dismissed all of the claims under sovereign immunity as having arisen from policy decisions during the reorganization of a WMATA department. The *Beebe* decision recognized that not all intentional or malicious torts committed in the course of employment are immunized, and provided as an example the use of physical force. 129 F.3d at 1289. It is hard to see how the unauthorized use of physical force differs in legal theory from the unauthorized commission of a fraud. The D.C. court here acknowledged

that the covenant of good faith and fair dealing undoubtedly constrained WMATA's behavior in the context of its contractual relationships, but not in tort. But, it did not arrive at that conclusion by legal analysis of the difference between the two, but rather by basing its conclusion on the circular reasoning of sovereign immunity. App. 12a.

Even assuming that the discretionary function exception may be read into the WMATA Compact by utilitarian reasoning, it is essential to the analysis in this case that both prongs set out in *Berkovitz* and *Gaubert* be properly understood and applied. When addressing the first prong, the question to be answered is whether the conduct is susceptible to policy judgment, for which purpose the courts look to the nature of the conduct rather than the status of the actor. *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984). Absent the violation of a mandatory regulation, which necessarily negates judgment and discretion, almost all conduct may be said to involve the exercise of discretion.[5] It is the second prong that is of greater interest and controlling here, assuming the applicability of the standard to WMATA. Here, the question to be answered is whether the judgment is of the kind that the discretionary function exception was designed to shield. The purpose of the exception is said to be to "prevent judicial `second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814. When properly construed,

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[5] The decision in *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) comments on the fact that when government counsel was pressed at oral argument to provide even one example of a discretionary function that would not be exempt for failure to implement policy concerns, he was unable to come up with an answer other than the time worn example of the negligent driver of a motor vehicle.

the exception "protects only governmental actions and decisions based on consideration of public policy." *Berkovitz*, 486 U.S. at 537.

The direct question then, which the court below declined to deal with, is whether there exists a public policy to exculpate WMATA from responsibility for its own fraud. Surely not. Because it is apodictic that neither social nor political policy favors the perpetration of fraud in the inducement of a contract, may economic considerations be taken into account on the ground that budgetary constraints necessarily control all administrative actions? The answer is twofold. First, the Supreme Court has never classified budgetary considerations to be sufficient to invoke the discretionary function exception. Although an agency must make decisions on where to spend its limited funds, that does not then, standing alone, become a decision based on considerations of public policy. The D.C. Circuit itself has stated that the mere presence of choice. even if it involves whether money should be spent, does not trigger the exception. *Cope v. Scott*, 45 F.3d 445, 449 (1995). Second, there is a large difference between allocating limited financial resources and the creation of a policy to mislead bidders to save money.

If the test of being susceptible to policy analysis as set out in *Gaubert*, 499 U.S. at 324-5 is so broadly read as to allow a conclusive presumption (*i.e.*, rule of law) that a discretionary function has been performed, then the concept of waiver of immunity will indeed be swallowed whole by the discretionary exception. See the dissent in *Smith v. WMATA*, 290 F.3d 201, 212-223 (2002).

CONCLUSION

For the reasons set forth above, and for the reasons enunciated in petitioners' application and brief, this court should grant a writ of certiorari.

Respectfully submitted,

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